United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7305

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-7305

JAMES ARNEIL, VERNON A. STOCKWELL,

Plaintiffs-Appellants,

-against-

JAMES B. RAMSEY, JR., OLIVER DeG. VANDERBILT, WILLIAM M. LENDMAN, BLAIR & CO., INC., THE NEW YORK STOCK EXCHANGE,

Defendants-Appellees.

On Appeal from the United States District Court
Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES RAMSEY, VANDERBILT AND LENDMAN

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BRIEF OF DEFENDANTS-APPELLEES RAMSEY, VANDERBILT AND LENDMAN

Issues Presented

1. Did the district court correctly conclude that the statute of limitations applicable to this action for alleged securities fraud is the three-year statute of the State of Washington because plaintiffs were Washington residents and there paid for and did all other acts incident to their subject securities transaction?

2. Should this Court abandon the rule of Sack v. Low, 478 F.2d 360 (2d Cir. 1973), that a securities fraud action commenced in a federal court in New York by non-residents of New York would be untimely if barred by the statute of limitations of the state in which

plaintiffs suffered their injury, merely because an inferior state court has ruled that the different question of the choice of substantive law in non-negligent torts should, under New York law, be determined by the "center of gravity" test?

3. Did the district court correctly dismiss the Section 10(b) claims as time barred under the Washington three-year statute of limitation, when this action was commenced five days less than six years after plaintiffs' subject securities transactions and at least four years and nine months after plaintiffs claim they discovered both the allegedly non-disclosed material facts on which they would base their action and the alleged involvement of the individual appellees?

Statement of the Case

Introduction

This is an appeal from a final judgment dismissing as time barred an action against defendants-appellees James B. Ramsey, Jr., Oliver DeG. Vanderbilt and William M. Lendman (collectively called "the individual defendants"), to recover damages for alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. and Rule 10b-5 promulgated

thereunder, 17 C.F.R. 240.10b-5 (Compl., Counts I, II, III and IV), and common law fraud (Compl., Count XIII). Plaintiffs-appellants claim they were induced to purchase securities of, and deliver secured demand notes ("SDN") to, the former brokerage firm of Blair & Co. Inc. ("Blair") on the basis of misrepresentations of material fact and without the disclosure of material information (Compl., ¶¶56-61; 68-70 and 123-129, App. 18-20, 28-29), specifically, (a) a claimed representation that Blair was a safe investment, and (b) no disclosure of Blair's financial weakness, the restrictions on its Schwabacher Division, the "chaotic condition" of its records and the prior and then existent violations of SEC and stock exchange rules by the Schwabacher Division of Blair and thus Blair itself (Compl. ¶¶39 and 40, App. 13, 14). Each plaintiff, while in Washington, signed a purchase agreement, SDN, subordination of security and other agreements and paid for the Blair shares on April 16, 1969 (App. 120-25). On September 25, 1970 Blair ceased operations and was placed in liquidation (App. 107).

This action was commenced on April 11, 1975 -- five days less than six years after plaintiffs paid for their Blair stock. The final judgment of dismissal was entered upon motion by the individual defendants for summary judgment on the ground that all claims for relief

purportedly asserted against them were time-barred. The District Court (Brieant, J.) applied this Court's decision in Sack v. Low, 478 F.2d 360 (2d Cir. 1973), and dismissed all Section 10(b) and common law claims as time-barred, holding that the New York "borrowing statute" compelled application of the three-year statute of limitations of the State of Washington, where plaintiffs resided at all times, where plaintiffs paid for their subject securities purchase by mailing their checks and executed their SDNs and mailed their collateral in the form of an authorization to transfer securities and certificates for some other securities.* The opinion below is at page 514 of the Appendix and is reported at 414 F. Supp. 334 (S.D.N.Y. 1976).

The Plaintiffs-Appellants

In 1969 plaintiffs-appellants were Washington residents (App. 78, 89), as they have remained to the present (App. 99-101). Prior to their purchase of the Blair securities, plaintiffs had engaged in substantial securities transactions. Each plaintiff had maintained individual securities accounts at six different brokerage

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* Some of the claims against the co-defendant-appellee, The New York Stock Exchange ("the Exchange") were also dismissed, while the balance of the claims against the Exchange were not dismissed. As the Exchange is filing a separate brief, matters relating only to the claims against the Exchange are not discussed herein.

houses (App. 84, 92). Additionally they maintained a joint brokerage account through which purchases of securities were made; one single purchase was in the range of $75,000 to $125,000 (App. 102-104). In 1969 each plaintiff had a net worth in excess of $1,000,000 and each earned in excess of $100,000 annually (App. 84, 87, 92, 97). Mr. Arneil was a partner in a law firm in the State of Washington, and Mr. Stockwell was an owner and general manager of two orchards (App. 83, 91). And, each was then the plaintiff in a securities action arising out of a 1963 stock transaction (App. 81, 94).

The Individual Defendants

Defendant Ramsey was the President of Blair, a member of its Board of Directors and of the Executive Committee thereof from May 1, 1969 until the firm ceased operations and was placed in liquidation on September 25, 1970 (App. 105-108). Mr. Ramsey never spoke to either plaintiff with respect to his securities transaction with Blair (App. 109-10).

Defendant Lendman was, until his resignation on April 30, 1969, the President of Blair, a member of its Board of Directors and of the Executive Committee thereof. Mr. Lendman never spoke to either plaintiff with respect to his securities transaction with Blair (App. 111-114).

Defendant Vanderbilt was the Chairman of the Board of Blair and a member of its Executive Committee until Blair ceased operations and was placed in liquidation on September 25, 1970 (App. 115-117). Mr. Vanderbilt never spoke to either plaintiff with respect to their securities transactions with Blair (App. 118-119).

The Transaction in Suit

Plaintiffs each purchased $15,000 worth of the stock of Blair, executed Secured Demand Notes and deposited $150,000 of securities as collateral in a subordinated account (App. 78-98, 120-25).* Each had first heard about the opportunity to purchase shares of Blair and to participate in a SDN account from Thomas McNell, their registered representative and an officer and director of Blair (App. 126-135). Plaintiffs had been clients of Mr. McNell's for some years and had moved their securities accounts to the brokerage firms with which Mr. McNell was affiliated at the time. After the cessation of Blair's public brokerage business, plaintiffs transferred their personal accounts to the firm(s) with which

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* By the SDNs, plaintiffs made a loan which Blair could use for purposes of computing the capital it was required to maintain under Exchange and SEC rules. As compensation for risking their securities, makers of SDNs receive interest from the brokerage firm, as well as the dividends and gains on the contributed collateral itself.

Mr. McNell became affiliated (App. 136-39). Plaintiffs only conversation(s) in connection with the transaction in suit with anyone at Blair other than Mr. McNell was with Mr. Benjamin Hepburn (App. 140-41, 143-44). Plaintiffs did not sue Mr. McNell or Mr. Hepburn.

All of the conversations with respect to the transaction at suit were had by telephone to or from the plaintiffs' offices in the State of Washington (App. 145-47). On April 16, 1969, plaintiffs mailed, from Washington, all of the purchase documents to Blair. Each plaintiff enclosed his check for $15,000 for the purchase of the Blair stock which had been drawn on his Washington bank account and an executed Stockholders Agreement, Secured Note, and Collateral Agreement. Additionally, they mailed the share certificates for most of the securities they were depositing as collateral into the subordinated account and an authorization to transfer certain other securities in their personal accounts to the subordinated accounts as collateral (App. 120-25).

In sum, plaintiffs were and are residents of the State of Washington; all oral communications in regard to their purchase were in telephone conversations made to and from Washington; all written communications were mailed to them in Washington; the stockholders agreements,

secured notes, stock certificates, collateral agreements, related documents and checks were mailed by them from Washington after having been signed and notarized in Washington and the capital stock of Blair was paid for by checks drawn in Washington on funds in a Washington bank. Thus in April 1969 they had completed their subject securities transactions.

Events Subsequent to the Transactions in Suit

On August 28, 1969 the SEC issued a release which publicly announced the violations of its financial, bookkeeping and reporting regulations by the then Schwabacher Division of Blair and set forth the disciplinary measures which had been imposed by the Commission and the Exchange (App. 148-53). This was reported in the Wall Street Journal on August 29, 1969 (App. 154).

In March, 1970 Blair mailed a letter to its stockholders which advised them that Blair had adopted a plan to obtain "a substantial amount of badly needed senior capital on a long term basis" and noted the "absence of any book value" for Blair's stock (App. 155-57). While Mr. Arneil did not recall having seen this letter or discussing its contents with Mr. Stockwell (App. 158-59), Mr. Stockwell does recall having received the letter and having discussed it with Mr. Arneil (App. 160-61).

In April, 1970 over $11,000,000 of subordinated accounts belonging to so-called Blair "insiders" (i.e., officers and employees) were liquidated to provide working capital (App. 162-64). Whether plaintiffs were aware of this fact in April, 1970 is not clear from the record.

However, at his deposition (pp. 160-61) Arneil admitted that during July 1970 plaintiffs were told that the affairs of Blair had reached a point where their investment was about to be liquidated, testifying that in a conversation with Mr. McNell that month:

> "Mr. McNell expressed complete shock at what was happening. He said he didn't know the affairs of Blair were in that state. He had been assured to the contrary by the executive committee or the officers that were running Blair . . . [namely] the thrqe individual defendants . . . Ramsey and Vanderbilt and Lendman."

Thus, on July 23, 1970, plaintiffs wrote to Blair in connection with the transaction in suit and stated:

a. That they had been advised by Mr. McNell that some or all of the so called "outside" SDN accounts were about to be liquidated and that they did not want their accounts liquidated;

b. "The extreme critical nature of Blair's problems were not known by us until this time;"

c. That proper disclosure of impending developments of the affairs of Blair having a material bearing on their willingness to participate in a "Secured Demand Notes and Stock Purchase Agreement" had not been made to them by Blair; and

d. That they demanded that the stocks and/or cash then in their SDN accounts be returned to them forthwith (App. 168-69).

On the next day, plaintiffs sent another copy of their letter of July 23, 1970 to Mr. Ramsey by Registered Mail, Return Receipt Requested. In a note covering the registered letter, plaintiffs reiterated their demand for the immediate return of their accounts and advised that they "will take immediate action against Blair & Co. & against any individual representing Blair & Co. who disposes of this stock in any way except by returning the stock to us." (App. 170-72).

On or about August 5, 1970 each received a letter from Blair which referred to the $11,000,000 April liquidation of "insiders" accounts, advised that Blair was not

in compliance with the Exchange's capital rules, that operating restrictions had been imposed, and that plaintiffs' own subordinated accounts were to be liquidated in the next few days in connection with a NYSE ordered sale or closing of all Blair's branch offices (App. 173-74). On August 5, 1970 Blair also sent a telegram to plaintiffs demanding payment of the SDNs and advising that absent payment their SDN accounts at Blair were scheduled to be liquidated on August 7, 1970 (App. 175-76).

On August 13, 1970 the NYSE publicly announced that Blair had terminated its public business "because of capital problems" (App. 177-79). The content of the news release was published in the Wall Street Journal on August 14, 1970 (App. 180-81).

On or about August 15, 1970 plaintiffs received a telegram from John P. Foley, Jr. advising them of an "emergency meeting of subordinated security holders of Blair & Co." that was to be held in New York on August 21, 1970, "independent of Blair management to compare notes and examine our mutual interests in the light of Blair's condition and conduct." (App. 182). Instead of attending in person, plaintiffs had their New York law firm of Webster, Sheffield attend in their behalf the meeting called by Foley (App. 183-84).

Despite their threat on July 23, 1970 to "take immediate action," plaintiffs-appellants did not file this action until April 11, 1975. By then it was time-barred.

Point I

The District Court Properly Ruled That The Washington Three-Year Statute Of Limitations Is Controlling

Appellants recognize that the question of whether their fraud claims are time-barred must be resolved by determining whether the New York State "borrowing statute," CPLR § 202, requires application of the three-year statute of limitations of the State of Washington applicable to fraud claims, Washington Rev. Code § 4.16.080(4).* The district court applied this Court's decision in Sack v. Low, 478 F.2d 360 (2d Cir. 1973), and held that the New York borrowing statute compels application of the Washington statute because (1) plaintiffs are Washington residents (a point not in dispute) and (2) any cause of action for fraud which they might have had would have accrued when and where they were injured, namely, in Washington where they were residents, from which they made their payments for the Blair stock, executed and mailed the SDNs, and mailed securities as collateral therefor.

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* As the Securities and Exchange Act of 1934 does not expressly provide for a private cause of action for damages if Section 10 has been violated, there is no statute of limitations contained therein. Thus federal courts apply the statute of limitations laws of the state in which they are sitting, including state statutes, like CPLR § 202, which adopt shorter statutes of limitations applicable in states in which causes of action accrued when claims are asserted by residents of a foreign state. Sack v. Low, 478 F.2d 360 (2d Cir. 1973).

Appellants appear to recognize that to succeed on this appeal they must convince this Court to overturn its decision three years ago in Sack v. Low.

Sack v. Low was decided by an opinion written by then Chief Judge Friendly, and the opinion demonstrates his scholarship and thoughtful analysis. Recognizing that the applicability of the borrowing statute turned on the question of "where the New York courts would hold this cause of action to have accrued," the opinion applied "[t]he traditional view . . . that a cause of action for tort arises when and where 'the last event necessary to make an actor liable . . . takes place.'" (Id., 478 F.2d at 365). Judge Friendly's view that New York would follow that traditional view was supported by citations to a statement by the highest court in New York, as well as decisions by the Appellate Division and Judge Weinfeld sitting in the Southern District of New York:

> "Hibernia Nat'l Bank v. Lacombe, 84 N.Y. 367, 384 (1881), *** 'the time when the cause of action arises determines, also, the place where it arises, for when that occurs which is the cause of action the place where it occurs is the place where the cause of action arises.' See also, Tandok v. Luckenback S.S. Co., 5 App. Div. 2d 857, 171 N.Y.S.2d 381 (First Dept.) leave to appeal denied, 5 App. Div. 2d 989, 173 N.Y.S.2d 992 (1958), Lowell Wiper Supply Co. v. Helen Shop, Inc., 235 F. Supp. 640, 644 (S.D.N.Y. 1964) (Weinfeld, J.) 'Claims accrue in New York when the plaintiff first acquires the right to seek a judicial remedy.'" Id., 478 F.2d at 365-366.

Thus, Judge Friendly concluded that New York courts would agree with

> "the weight of authority in other jurisdictions, which generally adopts the view of the First Restatement of Conflicts that a cause of action for fraud arises where the loss is sustained and that loss from fraud is deemed to be suffered where its economic impact is felt, normally the plaintiffs' residence. [Citations omitted]." Id., 478 F.2d at 366.

The reasoning of Sack v. Low was sound in 1973, and nothing has happened since to impair the validity of the analysis or the conclusions reached.

Appellants attempt to undermine Sack v. Low solely by pointing to a subsequent decision of the Civil Court of the City of New York, concededly an inferior state court (Appellants' Brief 16). But the decision upon which they would rely hardly supports appellants' position. Federal Insurance Co. v. Fries, 355 N.Y.S.2d 741 (Civ. Ct., N.Y.C. 1974), did not deal with the question of where a cause of action accrues for purposes of the borrowing statute, but rather with the question of what substantive law governs a cause of action for conversion. Under New York law, an action for conversion did not arise until defendants' wrongful refusal to return property, which occurred in New York. However, under the substantive law of the State of Pennsylvania where defendant had received the property, a cause of action

for conversion accrued when a defendant first obtained property which did not belong to him. Thus, although the distinction in Fries was important to the question of whether the action was time-barred -- because plaintiff there was not asked to return the property until a year and a half after it was erroneously delivered to him -- the decision involved a question of choice of substantive law rather than the question of where a cause of action accrued for purposes of the New York borrowing statute.

The opinion in Sack v. Low recognized the distinction between choice of substantive law and determining where a cause of action accrued for purposes of a borrowing statute. It was in connection with choice of substantive law that Judge Friendly wrote (Id., 478 F.2d at 366, emphasis added), "We recognize that the rigid rules of the First Restatement have been largely discredited as a sensible approach to solving choice of law problems," speculating that were the action a common law fraud action, New York might apply the "center of gravity" test to find its own substantive law applicable. However, this Court further stated,

> "[W]e do not think the likelihood of such a holding [respecting choice of law] would justify the further prediction that New York would rule that the state whose law is chosen to govern a defendant's conduct is necessarily the state where the cause of action accrued for purposes of its borrowing statute." Id., 478 F.2d at 367.

The wisdom of using Sack's economic impact test, in distinction to a center of gravity test, to determine where this federal cause of action accrued is also demonstrated by the relative ease of determining where the economic impact was felt -- as Judge Friendly noted, "normally the plaintiff's residence" Sack v. Low, supra, 478 F.2d at 366 -- compared to the difficulty frequently encountered in attempting to apply a "center of gravity" test. In fact, in the very opinion upon which appellants would rely, Federal Insurance Co. v. Fries, supra, the court found the "center of gravity" test impossible to apply. After listing the New York and Pennsylvania contacts, Judge Younger wrote: "And where is the center of gravity? I hardly know, perhaps because I am trying to quantify the unquantifiable [citation omitted] or reasoning in a circle." Id. 355 N.Y.S.2d at 746.

Even if a "center of gravity" test were applicable to determine where appellants' purported causes of action arose, the Court would undoubtedly find that they arose in Washington. Arneil was a resident of Washington. Stockwell was a resident of Washington. All communications leading to the subject securities transactions were by correspondence sent, and telephone calls made, from or to plaintiffs' office in Washington, and thus it was in Washington that plaintiffs claim to have been misled, to have relied, and

to have acted to effect their securities transactions. Plaintiffs in Washington wrote checks on their Washington banks to pay for the Blair securities. They mailed those checks in Washington. Plaintiffs executed their SDNs and collateral agreements in Washington, had them notarized in Washington and mailed them in Washington. Plaintiffs also mailed from Washington other securities to be placed in the subordinated accounts as collateral, and an authorization to take securities already held and place them in a subordinated account as collateral.*

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* In Sack v. Low, supra, the record did not disclose how plaintiffs there had paid for their securities, leading the court to speculate, "perhaps if the plaintiffs maintained an open account at defendant's New York office, and the loss was reflected in that account, this might make some difference." Id., 478 F.2d at 368, emphasis added. Appellants here have attempted to seize upon this dictum by arguing -- without explanation -- that their subordination accounts at Blair were handled as "open accounts" (Appellants' Brief 20). But, unlike the record in Sack, here the record clearly discloses that payment for appellants' purchase of Blair stock was made by check signed and mailed from Washington and drawn on a Washington bank, that plaintiffs' SDNs were executed and mailed in Washington, that collateral in the form of securities was mailed from Washington and that an authorization to transfer other securities as collateral was signed and mailed in Washington. Even those securities previously located in New York were not maintained in an "open account," but rather were transferred to the subordinated account pursuant to the authorization executed and mailed in Washington. Thus, the action clearly accrued in Washington.

And of course, as the Court below noted, referring to the discussion in Sack v. Low, Id. 478 F.2d at 368, even if a cause of action were to have accrued in New York, that would not diminish the fact that it also accrued in Washington, thus rendering the Washington statute of limitations applicable under New York borrowing statute.

Those were the events which led to and comprised plaintiffs' subject securities transactions. If plaintiffs ever had any cause of action under Section 10(b), it accrued in Washington when they made their purchase. It was there and then that they suffered whatever damage they claim, for it was then that they received securities claimed to be worth less than they bargained for. It is clear that the day after the purchase, had plaintiffs known of the alleged fraud, they could have filed a Section 10(b) suit for damages or rescission. Thus, the subsequent events respecting the ultimate sale of their collateral by Blair and Blair's bankruptcy were not the events which caused their alleged injury, but were merely manifestations of their claimed injury which occurred in Washington in April 1969 when they purchased the Blair stock and executed their SDNs.

Thus, pursuant to the unimpaired authority of Sack v. Low, supra, because any loss suffered by plaintiffs by reason of fraudulent inducement to effect the subject securities transactions was clearly suffered in Washington, the district court properly turned to the statute of limitations of the State of Washington to determine whether the action was time-barred.

Point II

Plaintiffs' Claims Are Barred By The Washington Statute of Limitations

The three-year Washington limitations on actions in fraud, Wash. Rev. Code § 4.16.080(4), begins to run when the allegedly aggrieved party knows the facts constituting the fraud or has the opportunity of learning them by the exercise of reasonable diligence. In In re Sackman's Estate, 34 Wash.2d 864, 869, 210 P.2d 682, 684 (1949), the court affirmed the lower court's ruling that a fraud claim was time-barred, and held (emphasis in original):

> "In Noyes v. Parsons, 104 Wash. 594, 177 P. 651, 654, the court said, in part: 'The broad assertion that the statute does not run until the fraud is discovered is not tenable. The statute begins to run when the fraud should have been discovered, and a clue to the fact which if followed up diligently would lead to discovery is in law equivalent to discovery.'"

And in Strong v. Clark, 56 Wash.2d 230, 232, 352 P.2d 183, 184 (1960), the Washington Supreme Court affirmed the lower court's decision granting defendant's motion for summary judgment based upon the three-year limitation, stating:

> "The statute begins to run in fraud cases when there is discovery by the aggrieved party of the facts constituting the fraud. RCW 4.16.080(4), supra. Actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it."

Thus, under both the federal tolling doctrine and the Washington statute itself, the statute did not begin to run until the time when plaintiff knew, or with reasonable diligence should have discovered, the alleged fraud.*

In the instant case substantially more than a "clue" to the facts of the alleged misrepresentation and non-disclosures was known to the plaintiff well prior to April 1972 (three years before the commencement of the action on April 11, 1975). The purchase was made in April 1969. The allegedly non-disclosed SEC and Exchange rules violations by Schwabacher and the restrictions which had been imposed by both agencies were announced

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* Appellants also argue that the statute of limitations was tolled by the filing of a class action, Carr v. The New York Stock Exchange, but, as the court below noted, that argument is not applicable to the claims against the individual defendants because they were not named parties in that action. (App. 524) Thus appellants misspeak when their brief states (Brief 11) they first learned that the individual defendants had participated in the alleged frauds practiced on plaintiffs "as the result of another pending class action," a proposition for which they cite only App. 412, appellants' statement pursuant to Local Rule 9(g) on the motion for summary judgment, which in turn cites only pp. 57-61 of Mr. Stockwell's deposition, which do not even remotely deal with the subject.

in a public document on August 28, 1969 by Securities Exchange Act Release No. 8677 (App. 148-53).

In Strong v. Clark, supra, 56 Wash.2d at 232, 352 P.2d at 184 (1960), the Washington Supreme Court concluded that:

> "When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument."

In March 1970, plaintiffs were advised that Blair required a substantial amount of "badly needed senior capital" and that their stock had no book value (App. 155-57). In April 1970 over 11,000,000 of subordinated accounts of Blair "insiders" were liquidated and the cash realized used to supplement working capital and bring Blair into capital compliance (App. 162-67).

Most significantly, at his deposition (pp. 160-61) Arneil admitted that during July 1970 plaintiffs were told that the affairs of Blair had reached a point where their investment was about to be liquidated, testifying that in a conversation with Mr. McNell that month:

> "Mr. McNell expressed complete shock at what was happening. He said he didn't know the affairs of Blair were in that state. He had been assured to the contrary by the executive committee or the officers that were running Blair *** the three individual defendants *** Ramsey and Vanderbilt and Lendman."

Thus, on July 23, 1970 and again on July 24, 1970 plaintiffs wrote to Blair and Mr. Ramsey and asserted that the "critical nature of Blair's problems were not known by us until this time" and that "proper disclosure" of facts bearing on their investment decision had not been made (App. 168-69), and demanded a return of their investment and threatened to take "immediate action" if their request was not honored (App. 170-72).*

Clearly plaintiffs are charged with discovery of the alleged fraud, including the alleged participation therein by the individual defendants by the end of July 1970, when they threatened to take "immediate action." If

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* Other events which occurred prior to April 1972 (three years before this action was commenced) were:

August 5, 1970 -- plaintiffs were advised that their accounts were about to be liquidated (App. 162-67, 175-76);

August 13, 1970 -- public announcement that Blair had terminated its public business (App. 177-81);

August 21, 1970 -- plaintiffs instructed their counsel to attend a subordinated lenders meeting, called by Dr. Foley, at which Blair's condition and conduct were to be discussed (App. 183-84);

September 1970 -- Dr. Foley and others thereafter sued Blair, these individual defendants, and others for securities law violations;

September 25, 1970 -- a liquidator was appointed for Blair and a Bankruptcy Petition was filed against Blair -- a proceeding in which at least Mr. Stockwell filed a claim (App. 107, 185).

they wished to sue, they certainly should have commenced an action within three years of July 1970, for "the statutory period does not await . . . leisurely discovery of the full details of the alleged scheme." Klein v. Bower, 421 F.2d 338, 343 (2d Cir. 1970). Nevertheless, they did not commence this action until April 11, 1975. As plaintiffs certainly had more than a "clue" well prior to three years before that time, their claims are barred by the Washington three-year statute of limitations.

Conclusion

For all of the above reasons, the judgment below should be affirmed.

Dated: New York, New York
September 30, 1976

Respectfully submitted,

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